SENATE BILL 1402
By Jackson

HOUSE BILL 1456

By Coleman

AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 11, to enact the "Tennessee Death Penalty Open File Discovery Act.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 39, Chapter 11, is amended by adding the following as a new Part 8:

Section 39-11-801. This part shall be known and may be cited as the "Tennessee Death Penalty Open File Discovery Act."

Section 39-11-802. This part shall apply to the prosecution of the offense of murder in the first degree in cases in which the state has filed notice of its intention to seek a punishment of death or life without parole pursuant to § 39-13-208 and Rule 12.3(b) of the Tennessee rules of criminal procedure.

Section 39-11-803.

As used in this part, unless the context otherwise requires:

(1) "Document" includes writings, drawings, graphs, charts, photographs, phono-records, electronically stored information, and other data compilations from which information can be obtained or translated, if necessary, by the defendant into reasonably usable form.

(2) “File" includes, but is not limited to, the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the first

degree murder offense alleged to have been committed by the defendant. Oral statements shall be in written or recorded form;

(3) "Investigative agencies" include all law enforcement agencies and offices, all investigative agencies and other offices involved in the investigative process, all laboratories, and all prosecution agencies and offices;

(4) "Inspection" includes testing and/or forensic analysis by the defendant's experts of all materials specified in § 39-11-804.

(5) "Relevant" means a document, tangible object, or statement is relevant if it is included in any file maintained by the state, or if it may reasonably lead to the discovery of admissible evidence in the case in connection with any of the crimes charged or the prosecution of the defendant;

(6) "Statement" means any oral, written, sign language or nonverbal communication; and

(7) "Tangible objects" include books, papers, documents, photographs, buildings, places, or any other objects, which pertain to the case or that were obtained for or belong to the defendant.

Section 39-11-804.

(a) Notwithstanding any other provision of law or rule to the contrary, except as provided in § 39-11-807, and during the time period specified in § 39-11-806, the district attorney general shall make available to the defendant for inspection and copying all relevant documents, tangible objects and statements, (including pretrial statements of witnesses commonly referred to as "Jencks" material) together with the complete files of all investigative agencies.

(b) The district attorney general shall give notice to the defendant of any expert witnesses that the state reasonably expects to call as a witness at trial. Each such witness shall prepare, and the state shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The state shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The state shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

(c) Prior to the beginning of jury selection, the district attorney general shall furnish to the defendant a written list of the names of all witnesses whom the state reasonably expects to call during the trial, including any character or rebuttal witnesses, and shall make available to the defendant for inspection all exhibits, including demonstrable exhibits, that the district attorney general intends to use at trial or introduce into evidence.

(d) Nothing in this act shall limit the state's duty to comply with federal or state constitutional requirements.

Section 39-11-805.

(a) All law enforcement agencies, laboratories and other offices engaged in the investigative process shall make available to the district attorney general on a timely basis all materials and information acquired in the course of any investigations relevant to the crimes charged against the defendant.

(b) No later than ninety (90) days after indictment, the district attorney general shall make written demand for all relevant files, documents, tangible objects, statements, and other relevant information to be provided to the district attorney general by all investigative agencies. Each investigative agency shall

furnish to the district attorney general a written certification, signed by the senior ranking member of that agency or by the custodian of the records that all such materials have been furnished to the district attorney general. The district attorney general shall make available to the defendant true copies of all written demands made by the district attorney general to the investigative agencies together with all certifications furnished by the investigative agencies.

Section 39-11-806.

(a) No later than ninety (90) days after indictment, the district attorney shall make available to the defendant true copies of all written demands made by the district attorney general to the investigative agencies together with all certifications furnished by the investigative agencies. Within this time period, except as provided in § 39-11-807, the district attorney shall make available to the defendant for inspection and copying all relevant documents, tangible objects and statements (including pretrial statements of witnesses commonly referred to as "Jencks" material)

(b) If the district attorney general or any investigative agency discovers prior to or during trial additional evidence or witnesses, or decides to use additional evidence or witnesses, and the evidence or witness is or may be subject to discovery or inspection under this part, the district attorney general or investigative agency must promptly notify the defendant or the defendant's counsel of the existence of the additional evidence or witnesses. The discovery obligations of the district attorney general and all investigative agencies are continuing and shall remain in effect throughout the case including any appeals or post-conviction proceedings relating to the case.

Section 39-11-807.

(a) The district attorney general is not required to disclose written materials drafted by the prosecuting attorneys or their legal staff for their own use at trial, including notes of their intended examinations of witnesses, voir dire questions, opening statements, and closing arguments. Disclosure is also not required of legal research of records, correspondence, reports, memoranda, or trial preparation interview notes by the prosecuting attorneys or their legal staff to the extent that they contain the opinions, theories, strategies, or conclusions of the prosecuting attorneys or their legal staff.

(b) When a district attorney general withholds information otherwise discoverable under this part by claiming it is subject to protection hereunder, the district attorney general shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself protected, will enable the defendant to assess the applicability of the claimed protection.

(c) Nothing in this section prohibits the district attorney general from making voluntary disclosures in the interest of justice nor prohibits a court from finding that the protections of this section have been waived.

Section 39-11-808.

(a) Upon motion and a hearing, the court shall have the authority to specify the time, place, and manner of making the discovery and inspection permitted and may prescribe appropriate terms and conditions.

(b) Upon motion and a hearing, and upon good cause shown, the court shall have the authority to deny, delay, or otherwise condition disclosure authorized by this part if it finds, based upon reliable information furnished to the court, that there is substantial risk to any person of physical harm, intimidation, or

bribery resulting from such disclosure that outweighs any usefulness of the disclosure; provided, however, that all material and information to which the defendant is entitled is disclosed in sufficient time to permit defendant or defendant's counsel to make beneficial use of the disclosure.

(c) Upon a request of any person, the court may permit any showing of cause for denial or regulation of disclosure to be made in camera. A record shall be made of both in court and in camera proceedings. Upon the entry of an order granting relief following a showing in camera, all confidential portions of the in camera portion of the showing must be preserved in the records of the court and made available to the appellate court in the event of an appeal.

Section 39-11-809.

(a) If at any time during the course of the proceedings the court determines that the district attorney general or any investigative agency has failed to comply with this part or with an order issued pursuant to this part, the court in addition to exercising its contempt powers may:

(1) Order the district attorney general or investigative agency to permit the discovery or inspection;

(2) Grant a continuance or recess;

(3) Prohibit the prosecuting attorneys from introducing evidence not disclosed;

(4) Declare a mistrial;

(5) Dismiss the charge, with or without prejudice; or

(6) Enter other appropriate orders.

(b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances

surrounding an alleged failure to comply with this part or an order issued pursuant to this part.

SECTION 2. This act shall take effect July 1, 2009, the public welfare requiring it.